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No. 315

In the Supreme Court of the United States

OCTOBER TERM, 1962

NEW ENGLAND TANK INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 8–18) is reported at 302 F. 2d 273. The Board's decision and order (B.A. 2–24)[1] are reported at 133 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (Pet. 8–18), and a petition for rehearing was denied on May 15, 1962 (Pet. 2). The petition for certiorari was filed on August 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "B.A." refers to the appendix to the Board's brief in the court below; "R.A." to the appendix to petitioner's brief.

QUESTIONS PRESENTED

1. Whether the Board's finding that Roix, Sarnacki and Webster were employees of petitioner at the time they declined to work because of petitioner's discriminatory refusal to hire other employees is supported by substantial evidence.

2. Whether the court below properly held that it was barred from considering petitioner's objections to an evidentiary ruling made by the Trial Examiner during the unfair labor practice hearing because petitioner had failed to raise the issue before the Board.

STATUTES AND RULES INVOLVED

The relevant statutory provisions and rules are set forth at pp. 19–22 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Company operates pipelines and petroleum tank farms in connection with the transportation of aviation fuel and related products (B.A. 11; 26, 42). In August 1960, the Company obtained a contract for the operation of a 200-mile pipeline, owned by the United States Government, between Searsport and Limestone, Maine (B.A. 11–12; 28–29). Under the contract, which is let every year, the Company's obligation was to operate and protect the pipeline (B.A. 12; 29). During the previous contract year, F. H. McGraw Company operated the pipeline and had in its employ all of the employees involved in this proceeding (B.A. 12; 44; 45). McGraw and its predecessors had since 1958 recognized and entered into collective bargaining agreements with the two unions

involved in this case.[2] Petitioner knew that the unions were recognized by McGraw (B.A. 14; 29).

On August 26, when the Company was awarded the contract to operate the pipeline, the Plant Protection union requested that it negotiate a contract on behalf of the guards who were employed by McGraw (B.A. 14; 182). The same day the Company, which was concerned because of alleged fuel losses sustained by McGraw (B.A. 14–16; 29, 32, 115–117, 134–135), contracted with a detective agency to provide about 16 guards for round-the-clock protective duties (B.A. 14; 91–94, 195–197). On September 15, the Company's superintendent, William Erwin, advised the Plant Protection union that the Company would not employ those persons being used by McGraw as guards; the Company gave the union no reason for the decision (B.A. 14; 37, 99, 107, 118, 184–185).

On September 16, Erwin hired Gordon V. Atwater, who had worked at the pipeline for six years, as assistant superintendent (B.A. 44, 113). Erwin told Atwater that there was a "possibility" that none of the McGraw guards or operators would be hired because of the "stock loss structure of the system" (B.A. 16; 113–114, 134). Erwin also told Air Force Inspector John Hayes that the Company was a "non-union shop" and that the "shortage situation all along the pipeline and at both terminals was too extensive and something would have to be done about it" (B.A. 62). At the same conference, Atwater told Hayes

[2] Independent Union of Plant Protection Employees in the Electrical and Machine Industry; and Oil, Chemical & Atomic Workers, International Union, AFL–CIO, Local 14–366.

that he (Atwater) planned to rehire "all of the present employees" of McGraw if permitted to do so "by the new contractor" (B.A. 62). Later, however, he told Hayes that he was not going to be permitted to hire any of the employees except Roix and Webster (the most experienced employees and the oldest in seniority) because the employees were "members of the union" (B.A. 63).

On September 19, Atwater told two McGraw employees when they reported to work that the Company "had taken the pipeline bid so low that they couldn't pay the union wage, and they wanted to break the union, and he said they was going to. The excuse they was using was the excessive loss of gas" (B.A. 15; 54–55). Atwater also told McGraw employee Roix that he, Atwater, was the only McGraw employee that the Company was going to hire because "the company bid so low they couldn't afford to pay the union wages," that the employees "must have been selling fuel to the families on the outside," and that the "employees weren't running the pipeline [e]fficiently" (B.A. 15; 47).

At about the same time, the Company placed advertisements in the Bangor newspaper soliciting applications for "Unskilled Workers (Male)—Many" and inviting interviews (B.A. 14; 189). All the McGraw employees later involved in the Board proceedings immediately presented their applications, which were among some 200 received (B.A. 67–68, 132).

Thereafter, on September 23, Atwater told Roix and Webster that Erwin had given him permission to hire "anyone he saw fit" and that all the Limestone em-

ployees were hired (B.A. 49–50): However, the next night Atwater told Roix that everything had changed and that just he—Atwater—Roix and Webster were being rehired and that none of the other employees would be considered. Atwater asked Roix and Webster if they would accept the jobs and they said they would (B.A. 51). Atwater then explained that the Company's lawyers had advised that the Company must hire "a certain percentage of union men" (B.A. 52). Atwater added, however, that "after September 30 * * * there would be no union on the pipeline because the company was against unions" (*ibid.*).

On September 30, the day before the Company was to commence operation of the pipeline, Oil Workers Representative Neilson telephoned Roix and told him that of all the McGraw employees only Roix and Webster at Limestone and Sarnacki at Searsport "were asked to go to work" (B.A. 2, 18; 52–53). Neilson then told Roix, "I can't tell you not to go to work, but if you want to stay with the union, you suit yourself" (B.A. 53). Roix decided to "stay with the rest of the boys" (*ibid.*). About the same time, Sarnacki telephoned Erwin and told him that "for reasons that [Erwin] should understand * * * [Sarnacki] would not be able to take the job" (B.A. 115).[3] Neither Roix, Webster, nor Sarnacki went to work (B.A. 114–115, 134).[4]

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[3] According to the testimony of Company Superintendent Erwin, Sarnacki had accepted the job on September 26, filling out a tax withholding form (B.A. 115).

[4] The Company stipulated that all three failed to report to work for the same reason (B.A. 139).

In the meantime, on September 21, the secretary-treasurer of the Oil Workers Union, wrote to the Company's president, and asked him to set a date for negotiating a collective bargaining agreement (B.A. 14; 186–187). On the same day, however, the Company's attorney had written to Neilson, the Oil Workers International representative, pointing out that the Company could not predict whether it would recognize the Oil Workers union and that it was concerned over "serious shortages" appearing to be attributable "either to pilferage, mismanagement, or both" (B.A. 187–188). Although the Company had hired some 50 persons by November 1960, this number included none of the unionized McGraw employees, either guards or operators (B.A. 125).[5]

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company discriminatorily refused to employ or re-employ the former McGraw employees, in violation of Section 8(a) (3) and (1) of the Act, because they were union members (B.A. 2, 13). In so doing, the Board rejected the Company's contention that its decision not to hire these employees was based on losses experienced by the preceding contractor, McGraw, which were chargeable to the employees. The Board also found that Webster, Sarnacki and Roix had accepted the Company's offer of employment but subsequently withheld their services in protest over the Company's refusal to employ their co-workers, and therefore that the three employees became unfair labor

[5] Except for Roix, Webster, and Sarnacki, discussed *supra*.

practice strikers entitled to immediate employment upon their unconditional offer to abandon the strike (B.A. 2–3, 18).[6]

The Board ordered the Company to cease and desist from the unfair labor practices found (B.A. 3–4). Affirmatively, the order required the Company to offer the employees the jobs they would have had but for the discrimination against them (the offer to Roix, Webster and Sarnacki being contingent upon their unconditional reapplication); to make the applicants whole for wages lost as a result of the discrimination, and to post appropriate notices (B.A. 4–5).

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice findings as supported by substantial evidence, and enforced the Board's order in full (Pet. 8–18).

ARGUMENT

1. Petitioner's sole contention on the merits of the case is that the Board erred in treating Roix, Webster and Sarnacki as unfair labor practice strikers because, since they had never accepted the Company's offer of employment, the Company could have no reinstatement and back pay obligation to them (Pet. 5–6). However, the issue of whether, absent an employment relation, individuals who refuse to work in protest

[6] Board Member Rodgers dissented from this finding (B.A. 6–8). The Board also found without dissent that the threatening and warning statements about unions addressed to the employees by Assistant Superintendent Atwater were attempts to intimidate the applicants in the exercise of their statutory rights, and thereby violated Section 8(a)(1) of the Act (B.A. 2, 18).

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against an employer's unfair labor practices may be treated as "employees" for purposes of the Act is not presented here.[7] The Board found (B.A. 3, n. 1), and the court below accepted the finding (Pet. 16), that the three employees had accepted employment with the Company and thereafter decided to quit work in protest over the Company's discriminatory refusal to rehire their fellow employees.[8] Petitioner's contention is thus merely an attack on this factual finding. Such an evidentiary issue does not warrant review by this Court, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the evidence detailed in the Statement demonstrates that there is ample support for the Board's finding. Thus, Assistant Superintendent Atwater told Air Force Inspector John Hayes that, while the Company would not permit him to hire other McGraw employees, he was being permitted to hire Roix and Webster (B.A. 62–63). Later, on September 24, Atwater told Roix that, while the others would not be considered, Roix and Webster were being rehired (B.A. 50–52). Atwater asked Roix and Webster if they would accept the jobs, and they said

[7] But see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

[8] Accordingly, the Board properly concluded that, by withholding their services in protest over the Company's unlawful refusal to employ their co-workers, the three men became unfair labor practice strikers, and as such, are entitled to reinstatement upon application. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278.

that they would (ibid.).[9] And, on September 26, Sarnacki was added to this group (n. 3, *supra*). It was only afterwards that the three men declined to work because of the Company's refusal to employ their co-workers.

On these facts the Board was warranted in concluding that, although the three employees had never reported for work with the Company, they had, by accepting the Company's job offers, in fact established an employment relationship with the Company. As the court below observed (Pet. 16):

> The men had accepted respondent's offer and were actually working on the pipeline on September 30. On October 1 when respondent assumed responsibility for the operation of the pipeline if they had reported to work, for however brief a period, and then left in protest over the respondent's activities, they would clearly be unfair labor practice strikers. However, we perceive no significant reason why a different result should obtain here. On the present record to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture.

2. There is no substance to petitioner's contention (Pet. 4–5) that the court below erred in concluding that it was barred from considering an evidentiary

[9] Roix testified (B.A. 2. 18; 51): "[Atwater] asked me and Webster if we would accept the job, and Webster asked him for an hour off so he could get in contact with our union representative, which is William Neilson. So Webster came back and said that we had, told Mr. Atwater that we would accept the job."

ruling made by the Trial Examiner because petitioner had failed to contest that ruling on appeal to the Board. In the disputed action, the Trial Examiner, during the course of the unfair labor practice hearing, ruled that counsel for petitioner could not, in cross-examination of a Board witness, question him about what he had previously said to a Board investigator respecting events which he testified to on direct examination (R.A. 216–218).[10] Petitioner raised no objection to this ruling in its exceptions to the Trial Examiner's Intermediate Report (Pet. 3, 16), but did seek to raise the issue on review of the Board's order in the court of appeals. In so doing, petitioner failed to comply with Section 102.46(b) of the Board's Rules and Regulations which provides "[n]o matter not included in a statement of exceptions [to the Intermediate Report] may thereafter be urged before the Board, or in any further proceeding."[11] In these circumstances, the court below was correct in concluding that, giving effect to the letter and purpose of the Board's rules of practice, "it is [not] now open to us to consider this issue" (Pet. 16).

[10] Petitioner's counsel was attempting to impeach the credibility of the witness by seeking to establish an inconsistency between the witness' testimony on direct examination and a prior statement given to a Board agent. Board counsel at the hearing offered to furnish the actual written statement made by the witness, but petitioner's counsel insisted on probing the witness' recollection. The Trial Examiner, apparently of the view that the written statement itself was the best evidence of what the witness had previously said, cut off the line of inquiry (R.A. 216–218).

[11] *NLRB Rules and Regulations and Statements of Procedure, Series 8*, effective November 13, 1959, as amended, Sec. 102.46(b) (Pet. 21–22).

Nor was the court required to disregard the Board's Rules and consider the issue because Section 10(e) of the Act (29 U.S.C. 160(e)) (Pet. 19–20) provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."[12] This provision of the Act and the decisions of this court interpreting it (*National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253), contemplate that the Board, like any other appellate body, will be apprised of the specific questions which the appellant intends to press and afforded an opportunity "to consider on the merits questions to be urged upon review of its order" (*Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. at 255, 256). See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

The obvious purpose of Section 10(e) of the Act and Section 102.46(b) of the Board's Rules is to adopt the customary appellate procedure whereby the appellate tribunal (here, the Board) is not required to "search the record for alleged errors not pointed out by appellant" (*Litton* v. *United States*, 177 F. 2d 416, 418 (C.A. 8), certiorari denied, 339 U.S. 921), or

[12] Petitioner makes no attempt to bring its case within the exception of Section 10(e) by showing that its failure to contest the evidentiary ruling before the Board is excused by extraordinary circumstances. It says only that the omission was "inadvertent" (Pet. 3).

"search for error not * * * formally specified" (*Purifoy* v. *United States*, 170 F. 2d 144, 145 (C.A. 5)). The raising of an objection at the hearing, as with registering an objection before a trial judge, serves to give the trier of fact an opportunity to correct any error, and to preserve the question for possible review on appeal. It does not, however, as petitioner argues (Pet. 4), apprise the Board of the objection or obviate the necessity for indicating, by specific timely exceptions, which of the alleged errors at the hearing the party desires to urge on appeal.[13] As pointed out by the Seventh Circuit in *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138, 143 (C.A. 7): "If we should hold that we will review matters raised before the Hearing Examiner, even though not considered by the Board, because the Examiner is an 'agent' of the Board, we would virtually destroy § 102.46(b) of the Board's Rules. The Board could hardly continue to consider only those issues in the Intermediate Report to which formal exception is taken if the courts are going to review everything raised before the Hearing Examiner."

[13] "Filing exceptions is tantamount to filing a notice of appeal * * *." *Kiekhaefer Corp.* v. *National Labor Relations Board*, 273 F. 2d 314, 317 (C.A. 7), certiorari denied, 362 U.S. 950.

No different conclusion is warranted here because petitioner's objection to the Trial Examiner's ruling afforded "automatic exception" thereto. Cf., Rule 46, Fed. R. Civ. Proc. The provision for an automatic exception preserves the question for review. The issue must still be made a part of the exceptions filed before the appellate body if review is desired there or in a further appeal proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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